1954

# State of Utah v. C. Jean Shonka : Brief of Appellant

Utah Supreme Court


Omer J. Call; Arthur Woolley; Attorneys for Appellant and Defendant;

IN THE

# SUPREME COURT

OF THE

# State of Utah

STATE OF UTAH,
Respondent
vs.
C. JEAN SHONKA,
Appellant and Defendant.

Case No. 8205 ~~756~~

## BRIEF OF APPELLANT



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## BRIEF OF APPELLANT

### STATEMENT OF FACTS

C. JEAN SHONKA, (Tr. 202-228; 277; 283-286) the defendant is an unmarried woman. From September of 1945 until charged in this cause, she served as secretary to the Principal, Alf L. Freeman, of the high school at Brigham City. Her employer was the Board of Education of Box Elder County. Miss Shonka's duties were

numerous, and she was given the title of treasurer. Among her duties was making arrangements for registration of students at the beginning of the school year.

The high school had a number of sources of income. One was registration fees. Another was an entity attached to the State Board of Education which disbursed monies to the high schools participating in athletic events in competition with other similar schools throughout the sate. These and funds from various student activities passed through Miss Shonka's hands. The system of accounting was loose. Receipts were issued and deposits made in the First Security Bank of Brigham City to the account of the high school. Checks against the account were signed by the Principal and Miss Shonka, as "Treasurer." Checks for deposit would be endorsed by her. Usually there was a "cash" fund in the vault, sometimes of substantial amounts.

An audit had been made, and there was some apparent discrepancy between the receipts and deposits.

The Principal appointed a teacher named Austin Larson (Tr. 106-142; 159) to act as treasurer and to sign receipts for these various funds coming into the school, and to make the deposits, and a new system of bookkeeping was being installed. (Bunderson 186)

Miss Shonka returned from the East where she had been attending a convention of the National Association of Business and Professional Women's Clubs. She was State President of the Utah Club. She employed an assistant secretary (Donna C. Petersen, Tr. 288) out of her own pocket to help her catch up on her work at the high school, and proceeded to get ready for the registration of the high school students for the opening of the Fall Term of 1952. The registration dates were fixed

by the Principal as August 25, 26, and 27, Monday, Tuesday, and Wednesday. (Tr. 43)

Mr. Freeman was away, and Mr. Larson, the newly appointed treasurer, was away, employed by the County High School Board as an artisan in repair work in the school buildings.

Miss Shonka looked about for some change that was needed to put in the change boxes to be furnished to the teachers who would receive the money from the registrants and receipt to the students therefor, and found none in the till. The cupboard was bare.

In looking through a steel cabinet in the vault room where "cash" was frequently held, in one of the drawers she came upon a check, (Exhibit P-2) dated March 28, 1952, in the amount of $300.55, and drawn by the Utah High School Activities Association and payable to Box Elder High School.

At about noon of that day, (August 21, 1952) she took this check and a money bag and went down to the First Security Bank of Brigham City, and openly and without stealth or concealment, endorsed the check, "Box Elder High School, by C. Jean Shonka, Treas." in her own hand; directed the bank teller, a young lady, as to the form in which she desired the currency, to-wit: Ten $20 bills and four $10 bills and ten $5 bills and $10.55 in currency, including some pennies. She received the cash and put the money in the bag, and returned to the high school, placed the bag with the money in it in the drawer where she had found the check, and continued her duties of setting up and making arrangements for the registration, with the assistance of the young lady she had employed to help her. The young lady sharpened several dozen pencils.

Miss Shonka took $50.00 of this change, including silver and pennies, from the bag and put it in the cash boxes used by the teacher-registrars, and readied the equipment for the five teachers who were assigned to register the students and take their fees, and handed the receipt books and the boxes to them, with the change, as they came to go to work on the night of August 25th, and each day thereafter. This had been the practice during all the time of Miss Shonka's employment.

When the registration was completed and the money had all been counted over to the new treasurer, and he had receipted for the exact amount paid by the registrants, (one receipt by him ran to Miss Shonka for the whole day's take), there was the exact amount of the "change" left over, $50.00, and this amount Miss Shonka put back in the bag and left the bag with this $300.55 cash in the drawer in the cabinet in the vault room where the check had been.

Upon all of this there is no dispute, except the timid statement of Mr. Freeman that he had never seen this check or any money secured upon it, and the statement of Mr. Larson that he had not received it, and the inference from a special auditor (Ralph L. Nielsen, Tr. 162), acting for Lincoln & Kelly of Salt Lake City, who discovered, through spot checking, that this check had been issued by the entity in Salt Lake City, and that it had cleared the banks, but he could find no record of it in the books of account of Box Elder High School, or any similar amount.

The trail of this check is not traced between the date of its issuance, March 28, 1952, and the date it was cashed, August 21, 1952. There is testimony by the Clerk (Marjolet Leiter, Tr. 17) in the office of the Utah High

School Activities Association in the State Capitol at Salt Lake Ciy that the check, in regular course, was mailed from that office in an envelope addressed to Mr. Freeman, Principal of the Box Elder High School at Brigham City, Utah, on the date it bears.

Mr. Freeman testified (Tr. 29-45; 69, 73, 82, 98, 104) that about January of 1952, he gave strict instructions to his staff, including Miss Shonka, that all mail addressed to him should be handled by the custodian of the building and placed upon his desk in the principal's office, bound up in string. He sometimes took the mail to home. (Tr. 69)

The check covered a reimbursement to the high school for monies advanced by the high school to the coach for expense of athletes. No one seems to have ever made any inquiry concerning this fund, and Mr. Freeman does not remember ever seeing the check. Neither the State entity nor the Bank questioned the authority of Miss Shonka to cash this check in the manner she did.

There was testimony that the vault and the filing cases were customarily left unlocked and they were so located that money could be carried away without detection by any of many persons, including students; and in fact, peculations of cash had been quite frequent, and "under the nose" of Mr. Freeman, the Principal.

## THE CHARGE AND VERDICT

On September 25, 1953, complaint was filed in the City Court of Brigham City, Utah, against the defendant, C. Jean Shonka, charging that on the 21st day of August, 1952, at Box Elder County, Utah, she did commit the crime of Grand Larceny, a felony, and Embezzlement, a felony.

After preliminary hearing, she was bound over for trial and the District Attorney filed an Information charging grand larceny and embezzlement in two counts in the same words as contained in the complaint, to-wit:

> COUNT NO. 1. Grand Larceny, a felony as follows, to-wit: that on or about the 21st day of August, 1952, in the County of Box Elder, State of Utah, the said defendant did then and there wilfully, unlawfully and feloniously steal, take and carry away money in the amount of $300.55, *or* a certain check dated March 28, 1952, in the amount of $300.55 drawn by the Utah High School Activities Ass'n., payable to Box Elder High School, and having a value of more than $50.00, the personal property of the Box Elder High School and the Board of Education of Box Elder County School District;
>
> COUNT NO. 2. Embezzlement, a felony as follows, to-wit: that the said C. Jean Shonka embezzled $300.55 of the Box Elder High School and the Board of Education of Box Elder County School District.

Defendant made demand for Bill of Particulars which was furnished, and upon the argument as to the sufficiency thereof, demand was made for Further Bill of Particulars, which was furnished.

These made the "uncertainties" more uncertain.

It is noted that in the Information, the defendant is charged in the grand larceny count with stealing "money in the amount of $300.55," *or* (in the alternative), "a certain check in the amount of $300.55."

The Further Bill of Particulars under count one limits the charge to *the money;* that is to say, paragraph 4 of the Further Bill of Particulars as furnished reads:

> "Defendant feloniously stole the money, the exact manner and means used to obtain the same are unknown at this time."

In the Further Bill of Particulars under count two, it is charged that the defendant committed embezzlement by taking and cashing said check, obtaining the money for said check, and fraudulently appropriating the same and converting the money to her own use, or secreting the same with a fraudulent intent to appropriate it to her own use.

The Jury returned the following verdict:

> "We the jury, duly impanelled and sworn, find the defendant guilty of Grand Larceny, a felony, as charged in the Information, *and not guilty of Embezzlement.*"

Motion for New Trial was made, including the following grounds:

6. That the court misdirected the jury in matters of law.

7. That the court erred in the decision of questions of law arising during the course of the trial.

8. That the court did and allowed acts in the cause prejudicial to the substantial rights of the defendant.

9. That the verdict is contrary to law.

10. That the verdict is contrary to the evidence.

This motion was over-ruled and denied.

The Court sentenced the defendant to be confined in the State Prison for an indeterminate term of not less than one nor more than ten years.

On notice of appeal being served and filed and upon a certificate probable cause, stay of execution was granted pending the appeal.

## ERRORS OF LAW RELIED UPON

The defendant assigns as error of law each of the following rulings of the Court, to each of which exception was timely taken and noted upon the record, or allowed by law; and defendant relies upon each severally for a reversal of the judgment against her:

ONE The defendant moved the Court for an order and judgment, upon the opening statement of the District Attorney, directing the jury to return a verdict of "no guilty" upon count one (grand larceny) of the Information. (Tr. 5) Motion denied. (Tr. 9)

TWO The defendant moved the Court for a directed verdict of "not guilty" upon count one (grand larceny) upon the evidence adduced when the State rested its case. (Tr. 199) Motion denied. (Tr. 202)

THREE At the conclusion of the taking of testimony, the defendant requested the Court to instruct the jury to return a verdict of "not guilty upon count one of the Information; namely, the charge of grand larceny, which request was refused. (Case File 33)

FOURTH The Court erred to the prejudice of the defendant in giving Instruction No. 8, relating to larceny of "lost property."

FIFTH Defendant made a motion for new trial, which was denied. The grounds stated as numbers 6 through 10 are relied upon.

## STATEMENT OF POINTS

### POINT I

NEITHER THE OPENING STATEMENT OF THE DISTRICT ATTORNEY, NOR THE EVIDENCE ADDUCED BY THE STATE, NOR ALL OF THE EVIDENCE IN THE CASE SUSTAINED OR JUSTIFIED THE SUBMISSION TO THE JURY OF THE CHARGE OF GRAND LARCENY.

### POINT II

THE COURT ERRED TO THE PREJUDICE OF THE DEFENDANT IN GIVING INSTRUCTION NUMBERED 8.

## ARGUMENT

### POINT #1

NEITHER THE OPENING STATEMENT OF THE DISTRICT ATTORNEY, NOR THE EVIDENCE ADDUCED BY THE STATE, NOR ALL OF THE EVIDENCE IN THE CASE SUSTAINED OR JUSTIFIED THE SUBMISSION TO THE JURY OF THE CHARGE OF GRAND LARCENY.

We have consolidated the three times in which we have made record directly upon this phase of the case. The errors of law relied upon, as set out in this brief, one, two and three, are consolidated in the single Point One in the Statement of Points for Argument.

Upon the trial we first raised the point and made record upon the opening statement to the jury by the District Attorney in outlining the proof he would present in count one of the Information.

This is the gist of that statement:

"* * * The check was presented at the First National Bank of Brigham City by Miss Shonka, and

that it was handled as a check item. It was not deposited in the high school account; it was not deposited in the Board of Education account; but the cash was given to Miss Shonka, $300.55. Then the evidence will show that the records of the school never indicated that that money ever reached the high school * * * *. It simply remained in Miss Shonka's possession."

Manifestly this does not state a case of stealing. There was no claim of conversion to her own use or attempt to deprive the owner of the money.

This statement that "it simply remained in Miss Shonka's possession," was the confession of the lack of proof of a necessary element of grand larceny, which justified a double-barrelled charge, including embezzlement.

(Had there been a three-barrelled charge, including embezzlement by mis-appropriation of or misuse of state money under the state employee statute, these facts, unexplained, might have justified a finding of guilty under that charge.)

No demand was ever made upon Jean Shonka to return the money so placed in her hands by the bank. This prosecution was commenced by the filing of a complaint without it ever having been suggested by anyone to Miss Shonka that it was contemplated such a charge would be made against her. She learned of the prosecution from a headline in the daily paper while she was presiding at the Convention of the Business and Professional Women's Club of which she was President and presiding at St. George.

And, until her testimony upon the trial, she had never been asked what happened to the money.

Notwithstanding the instruction (Number 3, Case File 41) informed the jury that if they found the defendant guilty as charged, in either count, their deliberations should there end and they should return into Court their verdict on that count only, the forms of verdict and the verdict used permitted the jury to and pointed to the jury that they should find the defendant guilty of one and no guilty of the other, that is to say, that unless they should find the defendant not guilty on both counts, that they should find the defendant guilty of one or the other, and not guilty of one or the other, and in this case the verdict returned was guilty of grand larceny and not guilty of embezzlement as charged in the Information.

We note this difference not to assign it as error, but to emphasize that there are certain findings of the jury which bind the Court as to the facts for consideration in determining the questions of law which we raise on the appeal.

By the verdict of not guilty of embezzlement, the jury determined, and so said, that they were not satisfied beyond a reasonable doubt that the defendant converted the money, $300.55 received by her upon the check, to her own use; and furthermore, the jury were not satisfied, and so said by their verdict, that she had a felonious intent to appropriate it to her own use, and to deprive the owner of it.

We have contended from the outset, and do now contend that the simple fact and undisputed fact, and all of the evidence in this case, shows that this accused went, in pursuance of her duties as she conceived them as an em-

ployee of the Box Elder County School District and Box Elder High School, and pursuant to the duties assigned to her by the principal of that school, openly and in the daytime, to the bank where she was known, where she was the sole person authorized to sign the name of Box Elder High School by the title Treasurer, cash checks, withdraw money, and carry on the business of Box Elder High School with said bank; and then and there and in the regular and ordinary course of events, cashed this check in order to get change, (the principal and the nominal treasurer being away and there being no loose change then to be found in the vault of the school), received this sum of money and carried it out of the bank in a bag. She did not claim it as her own. It did not come into her possession as her own.

It is asserted by the state that it came into her possession as an agent of the state. Whether she misused it or not, that is to say, whether she used this particular sum for a purpose in the business of the school other than that for which it was intended, is not pertinent and is not an element for consideration because the charge of embezzlement laid against her was under the general embezzlement statute and not under the statute relating to misuse, appropriation, or embezzlement of money by agents of the state. (76-28-59, 60)

Upon the evidence of the state, without considering that of the defendent, herself, we contended and do contend that there were not sufficient facts or inference from facts to warrent a finding that the defendent had a felonious intent in cashing the check, or that she had a felonious intent in carrying the money out of the bank.

This check had come from Salt Lake City in an envelope, without a letter of transmittal or any paper of any kind marking it or identifying it. The envelope was addressed to Alf L. Freeman, Principal of Box Elder High School, Brigham City, Utah, and in regular course came to him not more than forty-eight hours after it was posted on March 28, 1952. It is redolent of the way this principal conducted public business that he, as his testimony reveals, had no interest sufficient to give him concern whether there was any such sum of money coming or had come from that source, and he had never heard of it, so he testified, until the Lincoln & Kelly auditor discovered it in a spot check of sources of revenue to the high school in June of 1953.

The check was, in full daylight, cashed on August 21, 1952.

This check came from the state entity in an envelope with first-class postage on it. First-class mail, according to Mr. Freeman, is tied in a bundle with a string around it and delivered and placed on his desk in the high school; that he opened his own first-class mail; neither Miss Shonka nor anyone else was permitted to do so; that he frequently took bundles home with him before opening and frequently carried on correspondence upon his mail from his home. It is to be born in mind that this check was not cashed until after Miss Shonka had been East and had returned home from a National Convention which she had attended as a delegate.

There is not a scintilla of evidence that she at any time ever used or appropiated a single penny of the money to her own use, or to any use whatsoever other that the business of the Box Elder School.

Her testimony is undisputed that she left the cash intact, after having used a portion of it in registration, in the cabinet where she found the check. Mr. Freeman was not available. The new co-called Treasurer was not available. The check book was not available. There was no cash in the till. She had a duty to perform. She went about it as she had always done, doing the work as it was piled upon her.

It has been and is our contention that there could not be here a finding of an asportation, a felonious stealing and carrying away.

There is testimony in the case that records of the accounts of this high school were so loosely kept and the system of bookeeping so inadequate that there was an apparent difference between receipts issued and money deposited in the bank, which discrepancy was an accumulation over several years, and the auditor from Lincoln & Kelly testified that when these records were submitted to him, there were missing the receipts for an entire year, covering supposed miscellaneous items of income to the high school. This trail was not followed beyond the mere statement of it by the witness. The county Auditor of Box Elder County had made audits on the books of account for Box Elder High School through the years, and it was hearsay from him that the receipts were missing. He was not called as a witness by the state, nor was it shown that it was any fault of Miss Shonka's if all the receipts did not reach the hand of the auditor, nor was it shown that they did not reach his hands. We speak here of the duplicate or stub receipt books.

In the light of the loose way in which the Principal handled his mail and the manner in which these numerous side issue money transactions were handled, as reflected by the evidence, it was not unduly surprising that this check should be in a drawer in a file cabinet in the vault long after the date of its issuance. At the time of its discovery by Miss Shonka, she did not have the responsibility of issuing receipts or making deposits. This responsibility had been assigned to Mr. Larson. He was away working for the school board as an artisan.

It is absurd to suggest that she stole the check when she took it to the bank and there endorsed it in her own handwriting. (the usual manner of endorsing such checks was with a rubber stamp) This appearance in the bank was not that of a thief. She was known to the teller and everyone in the bank, and it was done openly and without stealth.

There was not the slightest element of concealment by the defendent.

The transaction was unusual, but this was because there had been a new and unusual situation created with respect to her work and her duties in carrying out her instructions from the Principal; but it is, we think, unrealistic to assume criminality or felonious intent in taking this check to the bank and cashing it.

There is dispute about the use of change and the need of change by the teachers registering the students. The parrot-like testimony of the teachers who were lined up to say they did not have any change in the boxes should be read in connection with the books of the receipt stubs of the receipts they issued. Norman Jeppsen

(Tr. 322-328) (referred to on the trial as Bishop Jeppsen), from Mantua, chairman of the registration panel, led off with the statement, under oath, that he had no change, although he made change, even down to pennies.

What happened to this money after Miss Shonka replaced it in the drawer of the cabinet in the vault is not explained by anyone. It was in the legal custody of the Principal and is in the same category as the check which came to the Principal's desk in an envelope and first came to view months later in this cabinet.

The mess of the financial affairs of the Box Elder High School needed a goat. A by-word in that school for several years had been, "Let Miss Shonka do it." The new one is, "Let Miss Shonka take it." This is the easier because she is not "one of us."

Although she was referred to as Miss Shonka and not "Sister" Shonka, she nevertheless bore a good reputation for integrity and truth and veracity in that community, unsullied until this charge was thrown at her while she was away and without opportunity of explanation.

We submit the question of the lack of sufficiency of the testimony totally to sustain a conviction of grand larceny to this Honorable Court, and bespeak a review of the record totally in that respect.

It has been held by this Honorable Court in several cases and throughout the time of the Court, that it is the duty of the judge, upon a trial for grand larceny to take the case from the jury when the evidence is insufficient to show a felonious taking.

State vs. Nelson
39 U 238
117 Pac. 71

*Grain*

Here there was conflict between witnesses as to whether one horse of the team that hauled the allegedly stolen wheat had one bare foot or two bare feet. The accused's horse had only one shoe off.

The trial court left the issue to the jury.

Mr. Justice McCarty, (Justices Frick and Straup concurring) set the verdict aside.

State vs. Morrell
89 U 498
118 Pac. 215

*A Cow*

He reclaimed the cow, *openly left her about his premises and in a field for a year and a half, and then butchered her.*

The accused claimed he had lost the cow when she was a yearling; that she was then branded with his brand "67" on the right hip, and that two or three years thereafter he found her on the range branded "H" on the left side.

The sheriff saw the hide on the fence with Kearns' brand, the "H", who had sold the heifer to Scorup, who claimed to be the owner of the critter.

State vs. Allen
56 U 37
189 Pac. 84

The accused killed horses of others to protect his water and open range lands.

The trial court said:

"I don't see how we can escape the conclusion that * * * if the defendant knowingly and wilfully takes a horse or a mule that belongs to another and asports it, drives it away, reduces it to his possession with the intention to deprive the owner permanently of its use, that the jury may find him guilty of grand larceny."

This Supreme Court, through Mr. Justice Frick, said "no" to that.

The opinion quotes the statutes for definitions, and from opinions from other courts.

We take the liberty of sub-quoting and underlining from

Akins vs. State
12 Okla. Cr. 269
154 Pac. 1007

"In cases of theft the question of the intent with which the accused took the property is one of fact to be decided by the jury, *except where the taking is open and without fraud or stealth,* under a claim of ownership, or where, *as in this case, the testimony as to the taking, standing alone, raises a presumption of fact in favor of an innocent taking, and there being no evidence from which a jury may legitimately infer a felonious intent, such evidence is insufficient to sustain a verdict of guilty.*"

State vs. Morris
70 U 570
262 Pac. 107

A syllabus reads:

"In prosecution for larceny of sheep, evidence *held* insufficient to take case to jury, where defendant was camp tender for owner of herd in which stolen sheep were found and was not otherwise interested in such sheep."

Justice Thurman for this court reversing trial judge Dilworth Woolley.

## POINT #2

*The court erred to the prejudice to the defendant in giving instruction No. 8.*

This instruction relates to the finder of lost property.

The instruction follows the language of the statute UCA 76-38-2. The entire account and all of the evidence as to where the check was and where the money went comes from the mouth of the defendant.

This testimony is undisputed. The check was found in a filing cabinet of the high school, cashed by the bank, and the money, and all of it, placed and left by the hand of the defendant where the check was, namely, in the possession of the true owner, as she, probably as well as anyone, knew.

It is no felony to leave misplaced property where the owner left it.

It is not larceny to convert a check into cash.

The possession of the check never passed from the owner, the high school, until it was delivered to the bank that cashed it, and the money received on it by Miss Shonka was never out of the possession of the high school, the owner, because she received it as the agent of the owner and replaced it in total where the owner had kept or misplaced the check.

There is a distinction between larceny of lost goods and goods that have been misplaced or laid down without intention of taking them up again and then forgotten. (32-Am. Jur. 981 No. 72.)

The finder of property merely mislaid is guilty of larceny if *with felonious intent he takes and appropriates it to his own use* whether he knows the true owner or not and irrespective of whether the intent to steal was formed at the time of or subsequent to the taking.

But here, definitely, also, it is held and we submit, is the law that in order to constitute larceny of mislaid property there must be a criminal intent to appropriate the property to the finder's own use in violation of the owner's rights.

Even though there may have been a duty, at least implied, resting upon Miss Shonka, upon discovery of the check to forthwith seek out the Principal or some other person connected with the high school and hand it over to such person or leave it lying, the breach of such duty, if there was one, is not a crime, and certainly not larceny.

Miss Shonka may have exceeded her authority in cashing the check at the bank and receiving the money for it. Even so, it was not a crime. On receiving the

money, there may have been a duty implied upon Miss Shonka to carry it to the Principal, or some other person connected with the Box Elder County School Board, but failing to do so it not crime, much less larceny.

Miss Shonka may have gone beyond the strict implication of her duty in placing part of the money for making change for the registering teachers, but the breach of this duty is not crime, and certainly not larceny.

Leaving lost property where you find it is not crime.

The giving of this instruction by the court was certainly calculated to confuse the jury and was probably the theory upon which the verdict of guilty of grand larceny was returned. It stands alone and unexplained in the case and unqualified. It departs entirely from the theory of the state under the information and the bills of particulars. In the form given it is a binding instruction carrying the implication that the court construed the testimony as proving the finding of lost property. The instruction permitted the jury to find the defendant guilty on a theory and relationship to the subject of the crime charged essentially different from that laid in the complaint and the bills of particulars. This was reversible error on the part of the court and alone would justify a new trial of this case.

The verdict of guilty should be set aside, and a new trial granted.

Respectfully submitted,
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